

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

ORIGINAL

77-1248

**United States Court of Appeals
For the Second Circuit**

UNITED STATES OF AMERICA,

Appellee,

-against-

EDMUND A. ROSNER,

Appellant.

On Appeal From The United States District Court
For The Southern District Of New York

APPELLANT'S BRIEF

J. JEFFREY WEISENFELD
Attorney for Appellant
401 Broadway
New York, N.Y.
(212) 925-8844

ELLIOT A. TAIKEFF
STEVEN M. JAEGER,
Of Counsel

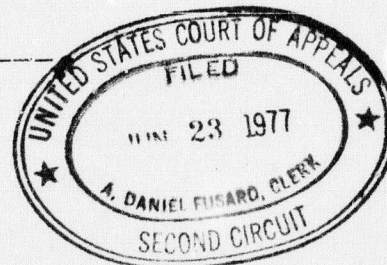


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-v-

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On Appeal from the United States District Court
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APPELLANT'S BRIEF

STATEMENT OF ISSUES

1. Whether the District Court's refusal to consider the juror's affidavits was error since the affidavits do not impeach their verdict.

2. Whether the District Court erred in denying a new trial on the grounds of non-disclosure of evidence pursuant to United States v. Agurs, 427 U.S. 97 (1976).

PRELIMINARY STATEMENT

This is an appeal from an order of the United States District Court, S.D.N.Y. (Wyatt, J.) entered on May 11, 1977 denying defendant-appellant's motion for an order vacating and setting aside the judgement of conviction entered herein and granting a new trial.

STATEMENT OF FACTS

On December 5, 1972, petitioner was convicted in the United States District Court for the Southern District of New York of the crimes of conspiracy, 18 U.S.C. §371, obstruction of justice, 18 U.S.C. §§1503 and 2, and three counts of bribery, 18 U.S.C. §§201(b) and 2 and 3227. His conviction followed a jury trial before the Hon. Arnold Bauman, U.S.D.J. After hearings on two separate motions for a new trial, petitioner was sentenced to concurrent terms of five years imprisonment. On appeal, his conviction was affirmed but the sentence was vacated and the case remanded for resentencing by another judge, 485 F.2d 1213 (2d Cir. 1973). No mandate issued, however, pending a petition for a writ of certiorari. While that petition was still pending, petitioner moved for a new trial based on newly discovered evidence that the government's main witness, Detective Robert Leuci, had committed flagrant and massive perjury at his trial concerning the extent of his own prior criminal misconduct. The Supreme Court denied certiorari without prejudice to the district court's consideration of the motion for a new trial, 417 U.S. 950 (1974). After a hearing, Judge Bauman denied the motion in an unreported opinion. On appeal the denial of the new trial motion was affirmed, 516 F.2d 269 (2d Cir. 1975). Certiorari was denied on June

30, 1976, 427 U.S. 911. On August 26, 1976, Rosner filed another motion for a new trial before the Hon. Inzer B. Wyatt, U.S.D.J., based in part on the jurors affidavits (see Appendix pp.A46-49) and the decision in United States v. Agurs, 427 U.S. 97 (1976). On September 3, 1976, that motion was withdrawn by leave of Judge Wyatt, without prejudice to its renewal after the United States Supreme Court ruled on Rosner's then pending petition for rehearing which was based in part on the jurors affidavits which were submitted with the petition as an appendix. On October 4, 1976, the Supreme Court requested the Solicitor General to respond to the petition for rehearing, 97 S. Ct. 49. On November 29, 1976, the petition for rehearing was denied, with Justice Marshall noting his dissent, 97 S. Ct. 513. Of course, the denial of a petition to rehear a petition for certiorari, like the initial denial of a petition for certiorari, is not a decision on the merits.

Previously, on August 16, 1974, the Hon. Inzer B. Wyatt, U.S.D.J., who had been assigned to resentence petitioner, imposed concurrent sentences of three years imprisonment on each count. On August 26, 1976, petitioner moved for a reduction of sentence pursuant to Fed. R. Crim. P. 35. This motion was denied on September 13, 1976. On September 26, 1976, petitioner filed a motion to vacate the August 16, 1974 sentence pursuant to Fed. R. Crim. P. 35 and 28 U.S.C. §2255 and to reassign the case for resentencing before another judge. On October 1, 1976, Judge Wyatt denied this motion. On February 1, 1977, the Court of Appeals for the Second Circuit affirmed, 549 F.2d 259. On April 22, 1977, a petition for rehearing containing a suggestion that the action

be reheard en banc was denied. A petition for a writ of certiorari was filed on May 23, 1977 (No. 76-1641).

On May 3, 1977, appellant moved for a new trial pursuant to Fed. R. Crim. P. 33. This motion was denied orally on May 11, 1977, Judge Wyatt stating:

I do not think it would serve the interests of justice to delay the determination of this matter on which my mind is fixed in order to permit me to write a long opinion. I have tried in my questions to counsel in the dialogue that we had to understand the situation thoroughly. Counsel have been very helpful.

Therefore, I endorse the motion. I have endorsed the motion after hearing this matter in open court. The motion is denied, so ordered.

Judge Wyatt, on May 6, 1977, also denied an order to show cause seeking bail pending disposition of the new trial motion. Appellant is presently incarcerated serving his sentence.

On May 6, 1977, appellant moved for an order disqualifying Judge Wyatt and assigning another Judge to consider the motion for a new trial. In the course of argument on the new trial motion, the court orally denied the motion to disqualify and later filed a memorandum, dated May 12, 1977, setting forth its reasons.

A timely notice of appeal was filed by appellant.

ARGUMENT

POINT I

THE DISTRICT COURT'S REFUSAL TO
CONSIDER THE JURORS' AFFIDAVITS
WAS ERROR SINCE THE AFFIDAVITS
DO NOT IMPEACH THEIR VERDICT.

In support of this motion, appellant submitted the affidavits of Sylvia Cohen and Seymour Meisner, who were members of the jury which convicted him. (See Appellant's Appendix) They say that if they had known about the many crimes that the Government's main witness, Detective Robert Leuci, had committed, and if they had known that he had lied about them during his trial testimony, they would not have voted to convict. Judge Wyatt refused to consider the affidavits, saying they fell within the prohibition of Rule 606 (b), F.R. Evid.

Judge Bauman's denial of defendant's previous motion for a new trial and the Court of Appeals affirmance, was based on a factual finding that Leuci's perjury about his criminal activities and the Government's suppression of evidence which the defendant specifically requested concerning Leuci's criminal past, did not affect the jury's verdict. The court concluded that there was, in reality, no significant chance that these disclosures would have induced a reasonable doubt in the minds of enough jurors to prevent a conviction. The affidavits of the jurors (see Appendix), who are the most qualified witnesses on this issue, contradict the factual premise which underpins that conclusion. One juror states that "the tapes were not that important, since you could hardly hear Rosner on them." (Cohen

affidavit). Moreover, the tapes do not include recordings of Leuci's first two meetings with Rosner, at which Rosner testified he was entrapped, although earlier meetings with DeStefano and Lamattina, Rosner's codefendants, were recorded by Leuci. The tapes by themselves are inaudible in part and contain ambiguities which required Leuci's interpretation which sharply contrasted with Rosner's and required a credibility determination by the jury. In addition, portions of the tapes support Rosner's entrapment defense. Both jurors state unequivocally that the basic issue before them was Leuci's credibility.

"Leuci's and Rosner's testimony varied concerning the events ...and in the end I believed Leuci's version." (Cohen affidavit).

"Leuci's testimony contradicted Rosner's and ultimately I believed Leuci." (Meisner affidavit).

Both jurors also state unequivocally that if they had known of Leuci's extensive criminal career and that Leuci had perjured himself at defendant's trial, they would not have voted for defendant's conviction.

"I know that if I had known that Leuci had lied during the trial and that he really had committed many crimes over and above the few bad things he mentioned at the trial, I would not have voted for Mr. Rosner's conviction." (Meisner affidavit).

"If I had known about all the crimes Leuci had committed and if I had known he had lied about them during his testimony I would not have voted for conviction." (Cohen affidavit).

Accordingly, there is a direct factual conflict between what the trial court assumed the jury would have done had they known of Leuci's perjury and the suppressed evidence, and what two of the jurors have sworn they would have done had they known of this evidence.

The juror's affidavits should have been considered on this motion and their testimony admitted at a hearing since their statements do not impeach their verdict within the meaning or policy of the rule that a juror may not impeach his verdict. That rule prohibits a juror from impugning the integrity of his verdict. For example, a juror may not testify that the verdict was the result of a compromise. Hyde v. United States, 225 U.S. 347 (1912); McDonald v. Pless, 238 U.S. 264 (1915); Stein v. New York, 346 U.S. 156 (1953); United States v. Green, 523 F. 2d 229 (2d Cir. 1975). Nor may he testify that he was influenced in reaching his verdict as a result of his own misconduct, such as reading a prejudicial newspaper account of the trial during deliberations. Mattox v. United States, 146 U.S. 140 (1892); United States v. Crosby, 294 F.2d 928 (2d Cir. 1961). But nothing contained in the jurors' affidavits impugns the integrity of the jury's deliberations and original verdict. The affidavits establish only that Judge Bauman was wrong in his factual finding, which was affirmed as supported by sufficient evidence, concerning the effect the knowledge of Leuci's criminal past and perjury would have had upon the jury's verdict.

The facts in this case are analogous to those in People v. Johnson, 79 Misc. 2d 880, 361 N.Y.S. 2d 512 (Dutchess Co. Ct. 1974). In Johnson, the court considered juror's affidavits which

stated that the jurors were prejudiced by the court stenographer's failure to read part of the defendant's testimony, which omission created the erroneous impression that the defendant had made an incriminating admission. The court ruled that the jurors' affidavits were grounds for a hearing to determine whether the defendant had been prejudiced by the court stenographer's omission. Here too the jury did not hear something it should have; and here too the issue is whether the defendant was prejudiced. In neither case is the jury verdict impeached; and in this case the affidavits should have been considered, as they were in Johnson. Allowing the erroneous conclusion that exposure of Leuci's criminal past and flagrant perjury would not have affected the jury's verdict to remain undisturbed by these affidavits "blinks reality." See, Parker v. Gladden, 385 U.S. 363 (1966); Turner v. Louisiana, 379 U.S. 466, 473 (1965).

Even if these affidavits are treated as statements by jurors concerning the manner in which they arrived at their verdict, it is clear that the jurors would be testifying in relation to the occurrence of an outside prejudicial event, Leuci's perjury and the government's suppression, which resulted in a violation of the defendant's Fifth and Sixth Amendment rights. The jurors do not impugn the integrity of the mental processes by which they reached their verdict nor do they state that the defendant was prejudiced by any act of misconduct on their part. It is established that a juror may testify to the occurrence of an outside prejudicial event which bore upon his verdict, Fed. R. of Evid. 606(b); Parker v. Gladden, 385 U.S. 363 (1966); Mattox v. United States, 146 U.S. 140 (1892); United States v. Howard,

506 F.2d 865 (5th Cir. 1975); Downey v. Peyton, 451 F.2d 236 (4th Cir. 1971); United States ex rel. Owen v. McMann, 435 F.2d 813 (2d Cir. 1970); United States ex rel. De Lucia v. McMann, 373 F.2d 759 (2d Cir. 1967); United States v. Crosby, 294 F.2d 928 (2d Cir. 1961). See also People v. DeLucia, 20 N.Y. 2d 275, 282 N.Y.S. 2d 525 (1967); People v. Johnson, 79 Misc. 2d 880, 361 N.Y.S. 2d 512 (Dutchess Co. Ct. 1974).

Even assuming further, for purposes of argument, that the jurors affidavits constitute impeachment of their verdict, this type of impeachment is permissible as an exception to the general rule against a juror's impeachment of his verdict. The Supreme Court said in McDonald v. Pless, 238 U.S. 264, 268-269 (1915), that "there might be instances in which such testimony of the juror could not be excluded without 'violating the plainest principles of justice.'", citing Mattox v. United States, 146 U.S. 140 (1892), and United States v. Reid, 53 U.S. 361, 366 (1851). In Mattox, the Court noted "public policy which forbids the reception of the affidavits, depositions or sworn statements or jurors to impeach their verdicts, may in the interest of justice create an exception to its own rule...", Mattox v. United States, 146 U.S. 140, 36 L.Ed. 917, 920.

Nor can there be any doubt that the juror's statements are admissible opinion evidence under Rule 701 of the Federal Rules of Evidence and under the federal case law governing the admissibility of opinion evidence by lay witnesses. It is established that an opinion of a lay witness elicited by a hypothetical question is admissible where the assumed fact upon which the witness' opinion is based exists, although conjecture without

a premise of fact is clearly inadmissible, Searfoss v. Lehigh Valley Co., 76 F.2d 762 (2d Cir. 1935); United States v. Bush, 522 F.2d 641 (7th Cir. 1975), cert. denied, 424 U.S. 977 (1976); United States v. Freeman, 514 F.2d 1184 (10th Cir. 1975); United States v. Isaacs, 493 F.2d 1124 (7th Cir.), cert. denied, 417 U.S. 976 (1974); United States v. Aleli, 170 F.2d 18 (3d Cir. 1948); Bettman v. United States, 224 F. 819 (6th Cir.), cert. denied, 239 U.S. 642 (1915); see also, State v. Metcalf, 14 Wash. App. 232, 540 P.2d 459 (1975).

The juror's answers to the questions of what they would have done if they had known about the many crimes that Leuci had committed and that he lied about them during his testimony, are suppositions based on known facts which are not in dispute. In federal fraud prosecutions, the testimony of witnesses, to whom the defendant allegedly made misrepresentations, as to what they would have done if they had known the true facts has been held relevant and admissible. United States v. Bush, supra, United States v. Freeman, supra, United States v. Isaacs, supra, Bettman v. United States, supra. Similarly, Leuci's perjury and the government's suppression of evidence relevant to Leuci's motive and credibility constituted a misrepresentation of the facts to the jury. The jurors' statements as to what they would have done if they had known the true facts should have been admitted to determine the question whether Leuci's perjury and the government's suppression prejudiced the defendant. The District Court erred in not considering the affidavits and in not holding an evidentiary hearing to establish the true facts of the situation. Appellant

requests that this Court reverse and order a new trial or, in the alternative, remand for an evidentiary hearing on the allegations of newly discovered evidence and governmental suppression of evidence.

POINT II

THE DISTRICT COURT ERRED IN
DENYING A NEW TRIAL ON THE
GROUNDS OF NON-DISCLOSURE OF
EVIDENCE PURSUANT TO UNITED
STATES v. AGURS, 427 U.S. 97
(1976).

The Supreme Court in United States v. Agurs, 427 U.S. 97 (1976), recently ruled that a prosecutor's failure to respond to a specific and relevant request for evidence helpful to the defense is seldom, if ever, excusable and that a strict standard of materiality is applied where the undisclosed evidence creates a reason to question the veracity of any prosecution witnesses. Application of this standard mandates setting aside the conviction. Indeed, a new trial is required even if the Court were to apply the applicable Agurs standard where no specific request for the undisclosed material was made by defense counsel; that standard requires that the omitted evidence create a reasonable doubt that did not otherwise exist. The jurors' affidavits (see Appendix) establish that such a doubt would have existed had the jury known the truth about the government's main witness. See, Boone v. Paderick, 541 F.2d 447 (4th Cir. 1976); United States ex rel. Annunziato v. Manson, 425 F.Supp. 1272 (D.Conn. 1977); Note, The Prosecutor's Constitutional Duty To Disclose Exculpatory Evidence In The Absence of A Focused Request From The Defense - United States v. Agurs, 14 Amer. Cr. L. Rev. 319 (1976).

Subsequent to the trial of Detective Leslie Wolff, a former partner of Leuci's, in New York State Supreme Court, New York County (Sandler, J.), which trial ended on February 18, 1977

in an acquittal, an article about Detective Robert Leuci, written by the former Deputy New York City Police Commissioner in charge of public relations, Robert Daley, was published in the March 28, 1977 issue of New York Magazine. This article, see Appellant's Appendix, supra, appears to have been prepared with the cooperation of the government since photographs of Leuci accompanied by federal or police bodyguards at secret hideaways are included in the article. The article describes Leuci's first interview over three straight days in February, 1971, with Nicholas Scopetta, then counsel to the Knapp Commission and who later as an Assistant United States Attorney, Judge Bauman found, was given the primary responsibility with Assistant United States Attorney Edward Shaw of gathering and disclosing to Rosner's defense "all 3500 material." Leuci is described as telling Scopetta that he gave narcotics to addict informants and that he took money from "dope pusher[s]" and "killer[s]" and that his family's future rests on the fact that some dope pusher or killer "is not going to give us up."

While attempting in an emotional outburst to tell Scopetta that the Knapp Commission was wrong to concentrate on corrupt policemen when, he alleges, there are judges, prosecutors, defense attorneys, "lawyers one and all" who are "more corrupt by far than cops", Daley sets forth Leuci's outburst on pages A50-51 of the Appendix:

"Do you know what it's like to be a narcotics detective? he asks Scopetta... Do you know what it's like on a February night in South Brooklyn, a block from the

piers, with two addict informants in the back of the car, both of them crying, begging you for a bag of heroin? Do you know what it's like going home 50 miles away and getting a phone call five minutes after you're home saying, I blew the shot, please come back give me another bag? And driving back 50 miles, and watching him tie up, and walking out of the room...

You lawyers are in Westbury or on West End Avenue, Leuci tells him [Scopetta]. We're [policemen are] in El Barrio, we're on 125th Street. You want us to keep everybody inside the barricades so you can stay outside. I'm on Pleasant Avenue and 116th Street at three o'clock in the morning, just me and my partner and Tony somebody that we have been following for three weeks, and he's going to offer us money, and me and my partner are going to decide whether we'll take it or not. You don't care about me. The only one who cares about me is my partner. It's me and him and this guy we caught. We're going to take his money. F--k him, f--k you, f--k them...

I see what kind of man you are, and I see what kind of man my partner is, Leuci goes on. There's just no comparison, see? I'm going to side with him. He tells me it's okay, Bobby, we can take this money. Hey Bobby, it's you and me against the rest of the world, and we have to go home and take care of our wife and kids. We can go on vacation this year instead of waiting five years, drive a decent car. You lawyers are eating in the Copa. We try to get \$40 expense money, and the department won't give us that.

We're selling ourselves, our families, Leuci continues. These people we take money from own us. Our family's future rests on the fact that some dope pusher is not going to give us up, or some killer, some total piece of s--t, is not going to give us up"

It is apparent from Robert Daley's article that Leuci admitted to Scopetta as early as February 1971, in their initial talk, that he accepted bribes from dope peddlers and killers as

payment for not arresting them and that he gave drugs to addict informants. Yet the only evidence of Leuci's crimes which the prosecution made available to Rosner as "3500 or Brady material" was a memorandum prepared by Scopetta of admissions Leuci made in this interview to three or four minor acts of corruption involving sales of information where Leuci acted as an intermediary, about which he testified at Rosner's trial. Although Rosner's attorneys vigorously attempted to elicit from Leuci further admissions of crimes, particularly narcotics crimes, they were totally unsuccessful. Leuci emphatically denied such involvement and insisted that the "last time" he had committed any illegal act was mid-1967 (T.Tr. 353, 380, 384). As Judge Bauman noted, "Leuci maintained under persistent cross-examination that these (four sale-of-information episodes) were the only criminal acts in which he had ever participated".

Yet, as the Daley article reveals, Scopetta, who as an Assistant United States Attorney had the responsibility of gathering and disclosing to Rosner's defense "all 3500 material," had in his possession evidence of far more serious crimes committed by Leuci as early as February 1971, which was not turned over to the defendant.

If it is true that Leuci told Scopetta before trial that he (Leuci) had been extensively involved in narcotics corruption, then this places the case in an entirely new light. A new trial would be required even under the reasoning of the earlier opinions of the District Court and the Court of Appeals.

Defendant's newly discovered evidence, at the very least, requires the holding of a further evidentiary hearing. See,

United States v. Morrell, 524 F.2d 550 (2d Cir. 1975); United States v. Hilton, 521 F.2d 164 (2d Cir. 1975). Yet, the District Court denied the motion after oral argument, refusing to hold a hearing to establish the validity of appellant's claims. Rather, the court held that it was not "persuade[d]" by the argument and denied the motion. Appellant contends this was error and requests that the case be remanded for an evidentiary hearing.

CONCLUSION

FOR THE FOREGOING REASONS, JUDGEMENT SHOULD BE REVERSED AND A NEW TRIAL ORDERED, OR IN THE ALTERNATIVE, THE CASE SHOULD BE REMANDED FOR AN EVIDENTIARY HEARING.

Respectfully submitted,

J. JEFFREY WEISENFELD, ESQ.
Attorney for Appellant
401 Broadway
New York, New York 10013
212/925-8344

ELLIOT A. TAIKEFF
STEVEN M. JAEGER,
Of Counsel

WEISENFELD
US v. Rosner

AFFIDAVIT OF PERSONAL SERVICE

STATE OF NEW YORK
COUNTY OF RICHMOND ss.:

EDWARD BAILEY being duly sworn, deposes and says, that
deponent is not a party to the action, is over 18 years of age
and resides at 286 Richmond Avenue, Staten Island, N.Y.
10302. That on the 23 day of June, 1977 at
No. 1 St. Andrews Pl.

NYC

deponent served the within *Brief*
upon U.S. Atty. So. Dist. of NY

the Appellee herein, by delivering true
copy(ies) thereof to him personally. Deponent knew the person so
served to be the person mentioned and described in said papers as the
Appellee therein.

Sworn to before me this
23 day of June 1977.

Edward Bailey
Edward Bailey

William Bailey
WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1978